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April 21, 2023

Via ECF

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, New York 10007

Re: *In re Google Digital Advertising Antitrust Litigation*, No. 1:21-md-03010

Dear Judge Castel:

On behalf of all MDL Plaintiffs, we submit this joint motion to compel Google to produce approximately 800,000 documents Google already has produced to the Department of Justice in its ad tech investigation, but that Google has withheld from Plaintiffs in these Actions. We note that there is no conference scheduled at this time.¹

The Court should order Google to produce without delay the 800,000 ad-tech related documents Google already produced to the DOJ and several states but has yet to produce to any Plaintiff in these centralized Actions. As the Court is aware, in parallel with these proceedings, DOJ has been investigating Google's monopolization of, and anticompetitive conduct in, various ad tech markets. *See* MDL Doc. No. 244 at 3. From the outset of this MDL, Plaintiffs have sought the materials Google produced to DOJ as part of that investigation, but Google has not produced them. *See* Tr. at 28:19-29:1 (Sept. 24, 2021), MDL Doc. No. 142 (Daily Mail counsel informing the Court of the "additional DOJ investigation" and requesting "access[]" to those materials). DOJ's investigation culminated in its filing a lawsuit in the Federal District Court for the Eastern District of Virginia. *See United States v. Google LLC*, No. 1:23-cv-00108 (E.D. Va.) ("DOJ Action"). Google acknowledges that the DOJ Action is "substantively identical" to these

¹ Pursuant to Fed. R. Civ. P. 37(a)(1), Plaintiffs attempted in good faith to obtain from Google the relief sought in this letter without the Court's intervention. Those attempts were unsuccessful.

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centralized Actions. Google Mem. Supp. Mot. To Transfer at 1, DOJ Action (E.D. Va. Feb. 17, 2023), ECF No. 44-2; *see id.* (calling the DOJ Action a “copycat” of the Actions centralized in these proceedings); *see also* Hr’g Tr. at 9:9-11, DOJ Action (Mar. 10, 2023) (Google counsel noting that the DOJ Action is “the same case, under the same legal theories, with the same allegations, concerning the same Google products and services, at the same time”).

Given the significant overlap between these Actions and the subject matter of the DOJ Action and the investigation that preceded it, Plaintiffs on January 27, 2023, served a Rule 34 request for “all documents produced to DOJ in connection with *United States v. Google LLC*, No. 1:23-cv-00108 (E.D. Va.), whether produced in response to DOJ’s pre-suit investigation” or otherwise. Pls.’ First Set of RFPs, No. 274(a). On February 27, 2023, in response to that request, Google agreed to produce approximately 800,000 documents it produced to DOJ during DOJ’s investigation. It has yet to produce them.

Google has given one reason for continuing to withhold the 800,000 DOJ documents: a purported need to discuss whether the DOJ documents must be reformatted to comply with the ESI Order in these Actions. That Order states that “[t]he parties will meet and confer” regarding whether investigation materials need to be reformatted to meet the Order’s specifications. MDL Doc.ECF No. 508 at 2. But on four separate occasions Plaintiffs have explained that they will accept the documents as-is and that no reformatting is necessary. During a March 24 meet and confer Plaintiffs informed Google it need not reformat the documents. In a March 28 letter Plaintiffs reiterated that Google should “produce them forthwith” in the format they were provided to DOJ. Ltr. from W. Noss to R. McCallum at 2 (Mar. 28, 2023) (Ex. A).² Despite those clear and repeated requests for the immediate production of the DOJ documents, Google again stated on a March 31 meet and confer that production must await further discussion of the production format. On April 12, Plaintiffs advised Google for a third time they would accept, without reformatting, the DOJ documents and asked that they be produced by April 17. *See* Ltr. from Disc. Steering Comm. to R. McCallum (Apr. 12, 2023) (Ex. B). Google did not produce the documents on the 17th.

On April 19, Plaintiffs again reiterated (for the fourth time) that they would accept the documents in the format Google already produced them to DOJ and asked Google to confirm by 2:00 pm on Friday, April 21 that it would produce them. *See* E-mail from E. Maier to R. McCallum at 2 (Apr. 19, 2023) (Ex. C). At 1:59 pm on April 21, Google responded, asserting for the first time that it has instructed its document vendor to “prepare the documents at issue for production” and that it will take almost a month to produce to Plaintiffs the documents it already produced to DOJ. E-mail from M. Evans-Aziz to E. Maier at 1 (Apr. 21, 2023) (Ex. C). Google

² A typographical error in Exhibit A misidentifies the date of the meet and confer as “Friday, March 23” and that error was repeated in two subsequent communications. The date of the meet and confer in question was Friday, March 24.

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asserts that it issued that instruction after an unidentified meet and confer, but Google never told Plaintiffs that it planned to produce those documents – not after the March 24 meet and confer, not in response to Plaintiffs’ March 28 letter, not on the March 31 meet and confer, nor in response to Plaintiffs’ April 12 letter. And Google has not explained why it would take four to six weeks to produce documents it has already produced to other parties in related litigation.

Google’s continued withholding of the DOJ documents is unjustified and is delaying efficient progress in these Actions. Producing the 800,000 documents involves only minimal burden for Google – the documents have already been reviewed by Google and prepared for production. Google can just push a button. Production of these documents would significantly aid the progress of document discovery in these Actions. For example, the parties are currently negotiating Google’s responses to Plaintiffs’ Rule 34 requests for documents and data. Google has proposed to fulfill its discovery obligations by, in large part, using search terms and custodians Google says it negotiated with DOJ. Access to the 800,000 DOJ documents that presumably resulted from those search terms and custodians will thus aid the parties in assessing the sufficiency of Google’s proposal. Plaintiffs have repeatedly made clear that we are willing to accept these indisputably relevant materials without any reformatting.

In light of Google’s agreement on February 27 to produce the documents, their clear relevance to these Actions, and the minimal burden associated with their production, Google should be ordered to produce the 800,000 documents immediately. *Accord* Manual for Complex Litigation § 40.21 (2004) (encouraging adoption of a case management order that requires parties to “produce documents to which they have not raised an objection on a rolling basis rather than waiting until all documents responsive to a request have been gathered”). We request the Court to order Google to produce these documents without delay.

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